

Exhibit A

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEW JERSEY

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4 SAM HARGROVE, et al,
5 PLAINTIFFS

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7 Vs.

CIVIL NO.
10-1138 (PGS)

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9 SLEEPY'S, LLC,
10 DEFENDANT

11

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13 **OCTOBER 25, 2016**
14 CLARKSON S. FISHER COURTHOUSE
15 402 EAST STATE STREET
16 TRENTON, NEW JERSEY 08608

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B E F O R E: THE HONORABLE PETER G. SHERIDAN
15 U.S. DISTRICT COURT JUDGE
16 DISTRICT OF NEW JERSEY

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20 **COURT'S OPINION OF CROSS-MOTIONS FOR SUMMARY**
21 **JUDGMENT/DEFENDANT'S MOTION TO STRIKE VITERI DECLARATION**

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Certified as true and correct as required
by Title 28, U.S.C. Section 753
/s/ Francis J. Gable
FRANCIS J. GABLE, C.S.R., R.M.R.
OFFICIAL U.S. REPORTER
(856) 889-4761

1 THE COURT: This matter comes before the Court on
2 three motions; two motions for summary judgment, and a motion
3 to strike the declaration of Tito Viteri filed by the
4 plaintiffs. The Court has reviewed the facts of this case
5 several times, but specifically, plaintiffs allege that they
6 were not paid for overtime work under the New Jersey Wage and
7 Hour Law, and that the plaintiffs were employees rather than
8 independent contractors. The resolution of the cross-motions
9 for summary judgment is a determination of whether the
10 plaintiffs are independent contractors or employees.

11 In a prior motion several years ago, this Court
12 erroneously applied the right-to-control test as set forth by
13 the Supreme Court in *Nationwide v. Darden*, and determined that
14 the plaintiffs were independent contractors and not employees.
15 The matter went to the Third Circuit; the Third Circuit
16 indicated that the Supreme Court of New Jersey should resolve
17 the standard for determining whether a person is an
18 independent contractor or an employee. As a result, the Third
19 Circuit petitioned the Supreme Court of New Jersey for
20 certification on that question. The Supreme Court and the
21 Third Circuit indicated that this Court should utilize the
22 "ABC test" to determine if the plaintiffs are independent
23 contractors or employees.

24 Factually, Sleepy's is a New York based mattress and
25 bedding company, has six distribution centers, including one

1 in Robbinsville, New Jersey. Sleepy's frequently contracts
2 with individuals and delivery companies (hereinafter referred
3 to as deliverers or delivery drivers) to deliver mattresses,
4 beds, and other products to customers. Consequently, such
5 deliverers enter into an Independent Driver Agreement (IDA)
6 with Sleepy's, and these driver agreements state that the
7 deliverers are independent contractors and "not employees of
8 Sleepy's." According to plaintiffs, Sleepy's classified all
9 of its delivery drivers as independent contractors to "save
10 money." Plaintiffs entered into driver agreements with
11 Sleepy's on behalf of businesses they owned or controlled,
12 and/or on behalf of themselves. Hargrove formed I Stealth and
13 entered into an IDA with Sleepy's in 2008; Hall entered into
14 an IDA with Sleepy's in 2005; Eusebio created Eusebio Trucking
15 in September 2003, and Eusebio entered into two separate IDAs
16 with Sleepy's, one in 2003, one in 2005. Mr. Eusebio also
17 partially owned Curva Trucking, which entered into an IDA with
18 Sleepy's in 2008.

19 Plaintiffs allege that they work full-time making
20 deliveries for Sleepy's. Plaintiffs could not perform
21 deliveries for other companies while performing deliveries for
22 Sleepy's. Plaintiffs never received any income from any other
23 source. Plaintiffs were free to use their vehicles and
24 personnel to perform deliveries for other companies who are
25 not performing deliveries for Sleepy's. According to the

1 IDAs, plaintiffs agree that "while performing deliveries for
2 Sleepy's, they would not carry merchandise or any other
3 business until they furnished the delivery manifest given to
4 them by Sleepy's at the end of the day." The delivery
5 invoices indicated that plaintiffs were "independent
6 truckers", and one of the terms and conditions of the customer
7 invoices stated that the "deliverers and deliverers' personnel
8 agree that they were not employees of Sleepy's and are not
9 entitled to and hereby waive any claim to any benefit provided
10 by Sleepy's."

11 Delivery services appear to be an integral part of
12 Sleepy's business. One of Sleepy's goals is to ensure that
13 Sleepy's customers receive the same type of delivery services.
14 The delivery function of Sleepy's starts with a sale, at which
15 time the Sleepy's customer selects a delivery time and is
16 charged for the delivery. Sleepy's then decides what truck
17 will deliver the mattress. Thereafter, the Sleepy's employee
18 devises a route with delivery time windows and assigns those
19 routes to delivery drivers through the use of a software
20 program. About 90 percent of Sleepy's sales are deliveries.
21 After each delivery, plaintiffs are required to enter the
22 delivery into a Sleepy's system called an Agentek scanner,
23 which in turn enters a delivery into Sleepy's database. In
24 addition to the Agentek scanner, Sleepy's provides plaintiffs
25 with packing tape, mattress bags, credit card swiper and other

1 paperwork required by Sleepy's. Plaintiffs are also required
2 by Sleepy's to maintain hand tools to accommodate proper
3 delivery. All of the plaintiffs report to Sleepy's warehouse
4 in Robbinsville, New Jersey. At that location they're
5 provided with daily delivery manifests, their trucks are
6 loaded with Sleepy's merchandise, and they also make returns
7 to the Robbinsville facility after completing their
8 deliveries. The plaintiffs spend about two to three hours at
9 the beginning of each day at the Robbinsville warehouse, and
10 they're required to return to the warehouse at the end of the
11 day to make returns of merchandise and pick up delivery and to
12 deposit money orders.

13 Sleepy's requires all deliverers, that one driver
14 and one helper work on each truck, and both persons must spend
15 their workday together on the road. Plaintiffs are not
16 required to punch a time clock. Plaintiffs are required to
17 obtain worker comp insurance and motor vehicle insurance.
18 Plaintiffs require Sleepy's to be an additional insured on the
19 motor vehicle and on their worker compensation insurance.

20 Sleepy's requires the employees to maintain a \$5,000 employee
21 dishonesty bond. Sleepy's requires plaintiffs to display the
22 Sleepy's logo on their trucks. And Sleepy's prohibits the
23 deliverers to display any other advertising on their trucks
24 without Sleepy's consent. Sleepy's does not schedule meal
25 periods or break times, nor does Sleepy's monitor the hours

1 worked by the delivery trucks. Sleepy's also does not
2 schedule vacation time. Sleepy's does not advise plaintiffs
3 of directions or traffic patterns to use during their workday.
4 Sleepy's requires the deliverers to wear a Sleepy's uniform,
5 which says Delivery Professional on it, and they have Sleepy's
6 ID badges. Sleepy's trains the delivery drivers on how they
7 should act with customers. Sleepy's provides a training
8 manual. Sleepy's performs field audits and inspects the
9 trucks for compliance with Sleepy's policies. If one of the
10 deliverers fails to follow Sleepy's rules, they're subject to
11 discipline, including a loss of pay. Sleepy's advises the
12 deliverers the time at which they should appear at work, and
13 if a driver is late Sleepy's could reassign the work to
14 another driver. In the IDA between Sleepy's and the
15 deliverer, they may be terminated without cause and without
16 notice. Sleepy's requires deliverers and their helpers to
17 undergo background checks prior to working for Sleepy's.
18 Summary judgment is appropriate under Rule 56(c)
19 when a moving party demonstrates there is no genuine issue of
20 material fact, and that the evidence establishes the moving
21 party's entitlement to judgment as a matter of law. *Celotex*
22 *v. Catrett*, 477 U.S. 317 at 322 (1986). A factual dispute is
23 genuine if a reasonable jury can return a verdict for the
24 non-movant, and it is material if, under the substantive law,
25 it would affect the outcome of the suit. That's *Anderson v.*

1 *Liberty Lobby*, 477 U.S. 242 at 248. Generally, on a motion
2 for summary judgment the district court does not make
3 credibility determinations or engage in any weighing of the
4 evidence, instead the non-moving party's evidence is to be
5 believed and all justifiable inferences are to be drawn in the
6 non-moving party's favor. That's *Marino v. Industrial*
7 *Crating*, 358 F.3rd 241, at 246-47.

8 Moreover, the only disputes of fact that might
9 affect the outcome of the lawsuit under governing law will
10 preclude entry of summary judgment. That's *Anderson*, 477 U.S.
11 247, 248. If the court determines, after drawing all
12 inferences in favor of the non-moving party and making all
13 credibility determinations in his favor, that no reasonable
14 jury could find for him, summary judgment is appropriate.
15 That's *Alevras v. Tacopina*, 226 Fed. App'x 222, at 227 (3d.
16 Cir. 2007).

17 The ABC test. This Court must apply the decision
18 of the New Jersey Supreme Court in *Hargrove v. Sleepy's*. The
19 appropriate test is the ABC test. The ABC test is derived
20 from the New Jersey Unemployment Compensation Act, and governs
21 whether a plaintiff is an employee or independent contractor
22 for purposes of resolving wage payments or wage and hour
23 claims. The test is as follows. The ABC test presumes an
24 individual is an employee, unless the employer can make
25 certain showings regarding the individual employed, including:

1 (A) such individual has been and will continue to be free from
2 control or direction over the performance of such service,
3 both under his contract of service and in fact; (B) such
4 service is either outside the usual course of business for
5 which such service is performed, or that such service is
6 performed outside of all the places of business of the
7 enterprise for which such service is performed; (C) such
8 individual is customarily engaged in an independently
9 established trade, occupation, profession or business.

10 N.J.S.A. 43:21-19(i)(6). See, *Hargrove v. Sleepy's*, 612 Fed.
11 App'x at 118. Moreover, the inability to meet any one of
12 these three criteria results in a finding that the individual
13 is an employee. *Hargrove v. Sleepy's*, 612 Fed. App'x at 117.

14 Now, looking at prong (A), in order to satisfy prong

15 (A) the employer must show that it neither exercised control
16 over the worker, nor had the ability to exercise control in
17 terms of completion of work. That's *Hargrove v. Sleepy's*, 220
18 N.J. 289, 305 (2005). The Court finds that Sleepy's exercised
19 control over the deliverers' work. Sleepy's required the

20 deliverers to sign IDAs. The IDA required that the deliverers
21 could not perform any other business while on duty with
22 Sleepy's. The IDA required plaintiffs to purchase insurance
23 and list Sleepy's as an additional insured. The IDA required
24 the deliverers to wear Sleepy's uniforms and to display

25 Sleepy's logos on their truck. Moreover, Sleepy's supervised

1 and monitored plaintiffs' work through the Agentek system, and
2 Sleepy's also directed the time each plaintiff was to start
3 work. Sleepy's also controlled the delivery process in that
4 Sleepy's trained the deliverers on how to interact with
5 customers, how the trucks needed to be loaded, and how to fill
6 out Sleepy's paperwork. In addition, the deliverers were
7 given specific routes to follow in making their deliveries,
8 and Sleepy's could monitor the deliverers' movements through
9 the Agentek system. And lastly, Sleepy's performed surprise
10 audits to determine whether the deliverers were appropriately
11 delivering bedding products. As such, the plaintiffs have
12 shown that they have not been free from control or direction
13 over the performance of their services. See, generally,
14 Restatement of Agency, *Supra*, Section 220; and *Carpet Remnant*
15 *v. N.J. Department of Labor*, 125 N.J. 567, 582 (1991).

16 Now, looking at prong (B), although the Court did
17 not have to reach any other prong after finding that the
18 deliverers were not free from control of Sleepy's, it will
19 review prong (B) anyway. Part (B) of the ABC test requires
20 that the employer show that the services provided were either
21 outside the usual course of business, or that the service is
22 performed outside of all places of business of the enterprise.
23 See, *Hargrove*, 220, at 459.

24 Here, in this case, Sleepy's is not a trucking
25 company, but part of its marketing scheme is quick delivery of

1 mattresses and other mattress accessories. Although Sleepy's
2 advertises white glove delivery services, and employs
3 approximately 100 individuals at its Robbinsville warehouse,
4 the Court is unpersuaded that Sleepy's is not engaged in the
5 delivery business. It is clear Sleepy's is engaged in the
6 mattress business, and an integral part of its business is the
7 delivery. See, *Carpetland v. Illinois Department of*
8 *Employment*, 211 Ill. 2d. 351, 386 (2002).

9 The last portion is prong (C). Prong (C) calls for
10 an enterprise that exists and can continue to exist
11 independently of and apart of the particular service
12 relationship. This enterprise must be one that is stable and
13 lasting, one that will survive the termination of the
14 relationship. *Hargrove*, 220 N.J. at 306. Generally, the ABC
15 test is satisfied when an individual has a profession that
16 will plainly persist despite termination of the challenged
17 relationship. As one court noted, when the relationship ends
18 and the individual joins the ranks of the unemployed, this
19 element of the test is not satisfied. See, *Chmizlak v.*

20 *Levine*, 20 N.J. Misc. 339 (1942). Sleepy's cannot meet prong
21 (C) because plaintiffs were customarily engaged in the
22 delivery service. The plaintiffs contend they did not work
23 for any other company; plaintiffs will rely on Sleepy's for
24 their income. Some of the plaintiffs earned 100 percent of
25 their income from Sleepy's. The plaintiffs also note that

1 they could not deliver other equipment or merchandise while
2 they're working for Sleepy's. In light of these facts, the
3 Court finds that at the time of the end of the relationship
4 between plaintiffs and Sleepy's, the plaintiffs would join the
5 ranks of the unemployed, and therefore, prong (C) is not met.

6 Lastly, Sleepy's contends that the FAAAA preempts
7 plaintiffs' case. The FAAAA provides that a state may not
8 enact or endorse a law or regulation or other provision having
9 the force and effect of law related to a price, route or
10 service of a motor carrier with respect to transportation of
11 property. 49 U.S.C. Section 14501(c)(1). The Third Circuit
12 has indicated that: It's a well-established principle that
13 the court should not lightly infer preemption. *Gary v. The*
14 *Air Group*, 397 F.3d 183, 190 (3d. Cir. 2005). Moreover, this
15 principle is "particularly apt in the employment law context,
16 which falls squarely within the traditional police powers of
17 the states, and, as such, should not be disturbed lightly."

18 See, *International Paper v. Ouellette*, 479 U.S. 481, 491
19 (1987). The Third Circuit has noted that "garden variety
20 employment claims" in particular, are not preempted by the
21 FAAAA. See, *Id.* at 189. Here, the Court finds that the
22 plaintiffs' claims are in the employment law context, which
23 fall "squarely within the traditional power of the states,
24 and, as such, should not be disturbed lightly." While
25 requiring that Sleepy's classify plaintiffs as employees may

1 have some impact on Sleepy's hiring practices and costs, there
2 is no evidence before the Court that classifying the drivers
3 as employees would fundamentally impact the business of
4 Sleepy's. The application of the ABC test to Sleepy's only
5 has a tenuous effect on the carriers' prices and services.
6 See, *Rowe*, 552 U.S. at 371. Moreover, because the Court found
7 under prong (B) that Sleepy's is not primarily a motor
8 carrier, the FAAAAA preemption does not seem to apply to
9 Sleepy's. See, *Schwaunn v. FedEx*, 813 F.3d 429; *Porillo v.*
10 *National Freight*, U.S. District Court, District of New Jersey,
11 docket number 15-07908. For these reasons, the defendant's
12 motions for summary judgment are denied.

13 For the foregoing reasons, the plaintiffs' motion
14 for summary judgment as to their employment status as
15 employees is granted, and defendant's motion for summary
16 judgment is denied.

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